Editor's note: 90 I.D. 338

JESSIE L. WINEGEART

v.

GLENN W. PRICE

IBLA 82-1227 Decided July 29, 1983

Appeal from decision of Alaska State Office, Bureau of Land Management, summarily dismissing private contest complaint against homestead entry application. AA-8196.

Affirmed as modified.

1. Contests and Protests: Generally -- Homesteads (Ordinary): Contests -- Rules of Practice: Appeals: Service on Adverse Party -- Rules of Practice: Private Contests

   BLM may not summarily dismiss a private contest complaint against a homestead entry for failure to file with BLM proof of service on the contestee within 30 days of service, as required by 43 CFR 4.450-3, where the evidence indicates that the contestant actually served the complaint and the contestant files proof of such service on appeal.

2. Contests and Protests: Generally -- Homesteads (Ordinary): Contests -- Rules of Practice: Private Contests

   BLM may not dismiss a private contest complaint against a homestead entry for

failure to offer reasons, not a matter of public record, in accordance with 43 CFR 4.450-1, where the complaint alleges failure to establish a residence within 6 months after the date of entry, as required by 43 CFR 2567.5(a), and the BLM land report, which concluded that there was such failure, was based on an examination of the land prior to the last day on which a residence could be established.

3. Contests and Protests: Generally -- Homesteads (Ordinary): Contests -- Rules of Practice: Private Contests

BLM must dismiss a private contest complaint against a homestead entry where it is not supported by the affidavit of a corroborating witness which alleges facts which, if proved, would subject the homestead entry to cancellation as required by 43 CFR 4.450-4(c).

APPEARANCES: Jessie L. Winegeart, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Jessie L. Winegeart has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated July 16, 1982, summarily dismissing his private contest complaint against the homestead entry application of Glenn W. Price, AA-8196.

On October 24, 1972, Price filed a homestead entry application for 160 acres of land situated in the N 1/2 NW 1/4 sec. 28 and the E 1/2 NE 1/4 sec. 29, T. 20 N., R. 9 E., Seward meridian, Alaska, pursuant to the Act of May 14, 1898, as amended, 43 U.S.C. § 270 (1976). 1/ By decision dated

1/ Section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2789, provided that some parts of 43 U.S.C. § 270 were

October 1, 1981, BLM allowed the homestead entry application. 2/ On April 1, 1982, Janet Sosnowski, a BLM realty specialist, prepared a land report, based on a March 31, 1982, examination of the subject lands. Sosnowski concluded that "[t]he entryman has not established residence on the parcel within the required time period," i.e., within 6 months of the date of entry, as required by 43 CFR 2567.5(a) (Land Report at 2). She stated that a residence must be established "before April 1, 1982." Id. at 1. The land report was concurred in by the district manager on April 1, 1982.

On April 2, 1982, appellant filed a private contest complaint against homestead entry application AA-8196. The complaint charged that Price had never occupied, built a habitable house on, or cleared the subject lands and that the time for moving and occupying the lands had expired. The complaint was supported by two affidavits. In addition, appellant requested a "preference right" for a homestead on the subject lands. Appellant submitted a homestead entry application (AA-47638) for the subject lands with his complaint.

In its July 1982 decision, BLM summarily dismissed appellant's contest complaint because appellant had not filed proof of service of the complaint on Price. In addition, BLM stated that the complaint did not meet the

fn. 1 (continued)
repealed effective on Oct. 21, 1976, and that other parts were repealed effective on the 10th anniversary of the date of approval of FLPMA, Oct. 21, 1976.
2/ By notice dated Sept. 1, 1981, Price was informed by BLM that, due to the filing of protests by the State of Alaska and Cook Inlet Region, Inc., his application was not subject to automatic approval under section 1328 of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2489 (1980), but, rather, had to be adjudicated under the applicable statute.

requirements of 43 CFR 4.450-4(a) and (c) and that the filing fee, required by 43 CFR 4.450-4(d), had not been paid. Finally, BLM concluded that the failure to establish a residence within the required time period was not a proper basis for a private contest under 43 CFR 4.450-1 because it was a matter of public record in the April 1, 1982, land report, and that there was no requirement that the homestead entry applicant build a habitable house on or clear the subject lands at that time. 3/

In his statement of reasons for appeal, appellant contends that he "caused to be mailed to Glenn W. Price by certified letter, return receipt requested, on April 12, 1982, a copy of said Contest Complaint with attached exhibits which was duly delivered on April 26, 1982." Appellant states that he did not submit proof of service or the filing fee because he was told by a BLM employee that filing the complaint was all that was required to initiate a private contest. Appellant submits with his appeal a copy of a return receipt card, dated April 26, 1982, and signed by Coreen R. Price, 4/ and a United States postal money order in the amount of the filing fee. Finally, appellant argues that the lack of residence within the required time period was not a matter of public record because BLM examined the subject lands on March 31, 1982, "before the expiration of the six month period from the date of the allowance of the entry of Glenn W. Price."

3/ By memorandum dated July 16, 1982, BLM transmitted a proposed Government contest complaint against homestead entry application AA-8196 to the Regional Solicitor. The complaint charges that Price "failed to establish residence upon the contested claim within six months after the allowance of the entry on October 1, 1981." By memorandum dated July 22, 1982, the Regional Solicitor found the complaint to be "legally sufficient."

4/ Appellant explains in an attached affidavit, dated Aug. 21, 1982, that he learned after filing his complaint that Price did not reside at his address of record with BLM. He also learned Price's new address and sent a copy of the complaint to that address where it was received on Apr. 26, 1982.

[1] The first question in this case is whether BLM was entitled to summarily dismiss appellant's complaint because appellant did not submit proof of service of the complaint upon the homestead entry applicant, Price. The applicable regulation, 43 CFR 4.450-5, provides that: "The complaint must be served upon every contestee. If the contestee is of record in the land office, service may be made and proved as provided in § 4.422(c)." 5/

The applicable regulation, 43 CFR 4.450-3, requires filing proof of service with the appropriate BLM office in addition to service on the contestee: "The contestee must serve a copy of the complaint on the contestee not later than 30 days after filing the complaint and must file proof of such service, as required by § 4.422(c), in the office where the complaint was filed within 30 days after service." (Emphasis added.) Finally, 43 CFR 4.450-5(a) provides for summary dismissal: "[I]f the complaint is not served upon each contestee as required by this section, the complaint will be summarily dismissed by the manager and no answer need be filed." (Emphasis added.) There is no evidence that appellant filed proof of service of his complaint with BLM "within 30 days after service," as required by 43 CFR 4.450-3, and appellant does not maintain that he did. However, 43 CFR 4.450-5(a) provides for summary dismissal only where a complaint "is not served upon each contestee," in accordance with that section. There is nothing in that particular section which mandates dismissal of a complaint for failure to file proof of service with BLM. Moreover, we cannot discern any prejudice to the entryman where appellant has provided evidence that he

5/ 43 CFR 4.422(c) provides that service may be made by sending a document by registered or certified mail, return receipt requested, to a person's address of record with BLM and that the post office return receipt will constitute proof of service.

served the entryman as required by the regulation. Cf. Phillips Petroleum Co. v. Bradshaw, 66 IBLA 234, 237 (1982) (Burski, AJ, dissenting). Accordingly, BLM may not properly dismiss the complaint for that reason.

Appellant's argument that his failure to file with BLM was based on the alleged statement of a BLM employee is not dispositive on this question. In his August 1982 affidavit, appellant states: "I asked Jenice Weigle what else I needed to do with regard to my contest of the Glenn W. Price Homestead Entry and she informed me that filing the Complaint was all I needed to do." Even if such a statement were true, appellant cannot be considered ignorant of the true facts. All persons dealing with the Government are presumed to have knowledge of duly promulgated regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). Accordingly, appellant is deemed to have known that proof of service was required to be filed in accordance with 43 CFR 4.450-3. However, as stated above, the failure to file with BLM may not be considered a proper basis for summary dismissal of the complaint.

[2] The next question is whether appellant's complaint was properly dismissed because it alleged facts which were either a matter of public record or not relevant at the time the complaint was filed. Regulation 43 CFR 4.450-1 provides for the initiation of a private contest in order to have an adverse claim of title or interest "invalidated for any reason not shown by the records of the Bureau of Land Management."

The reason for this provision is based on the fact that a successful contestant of a homestead entry gains a preference right pursuant to section

2 of the Act of May 14, 1880, as amended, 43 U.S.C. § 185 (1976). 6/ As we said in Wright v. Guiffre, 68 IBLA 279, 284 (1982, appeal pending): "[T]he legislative purpose of the preference right would hardly be served by a contestant's informing BLM of what it is already aware." A private contest complaint which offers reasons in opposition to an adverse claim which are a matter of public record is properly dismissed on that basis. Imco Services, 73 IBLA 374 (1983); Gold Depository and Loan Co. v. Brock, 69 IBLA 194 (1982); Christie v. O'Glesbee, 23 IBLA 155 (1975).

When appellant's complaint was filed, the official records of BLM, in the form of a land report dated April 1, 1982, showed that the entryman had failed to establish a residence on the subject lands as of March 31, 1982. Appellant argues that this fact is not conclusive as to the failure to establish a residence within the 6-month period required by 43 CFR 2567.5(a). We agree. The 6-month period began on October 1, 1981, the date the entry was allowed. Albert A. Howe, 26 IBLA 386 (1976). It, therefore, ended on April 1, 1982, and was inclusive of that date. Bennett v. Baxley, 2 L.D. 151 (1884). 7/ In Bennett v. Baxley, supra at 151, the Acting Secretary stated: "The six months within which he was required to commence residence on the tract would therefore commence November 21, 1880, and expire May 21, 1881, and he had the whole of the latter day for that purpose."

6/ Section 702 of FLPMA, 90 Stat. 2787, repealed this section effective Oct. 21, 1976, except as it applied to public lands in Alaska where repeal is to become effective on the 10th anniversary of FLPMA.

7/ The required 6-month time period is taken from R.S. § 2297, as amended, codified at 43 U.S.C. § 169 (1976), which was applied to public lands in Alaska by the Act of May 14, 1898, supra. The former statute provides that land shall revert to the Government if the entryman "has failed to establish residence within six months after the date of entry." 43 U.S.C. § 169 (1976) (repealed by section 702, FLPMA, 90 Stat. 2787).

Secretary Teller stated in Humble v. McMurtrie, 2 L.D. 161 (1884), that "[a]s to residence, a settler legally establishes a residence the instant he goes on the land for the purpose of establishing it." Further, it has been held that "a homestead entryman has six months from the date of his entry in which to establish his actual personal residence on the land, and if he establishes residence within that time, such act relates back to the date of his entry * * *." Stewart v. Provence, 24 L.D. 522, 524 (1897). Accordingly, in the present case, the entryman could have established a residence on April 1, 1982, and whether he did or not was plainly not reflected in the April 1, 1982, land report. It was thus not a matter of public record within the meaning of 43 CFR 4.450-1. 8/

[3] Appellant's private contest complaint, however, is fatally defective for another reason not specifically addressed by BLM. 43 CFR 4.450-4(c) provides with respect to the corroboration of allegations of fact in the complaint "which, if proved, would invalidate the adverse interest," that: "Each such allegation of fact must be corroborated by the statement of at least one witness having personal knowledge of the alleged fact and such fact must be set forth in the statement." (Emphasis added.) Appellant submitted with his contest complaint two affidavits, one signed by appellant and the other signed by Conrad Winegeart. The latter affidavit is the only affidavit

8/ With respect to appellant's other contentions, regarding clearing the land and building a habitable house, these contentions were premature. The entryman was not required to cultivate the land until the second year of the entry, 43 CFR 2567.5(b), and was not required to have built a habitable house until the time for submitting final proof, 43 CFR 2567.5(c). These allegations could, therefore, not form the basis for a contest complaint at the time the complaint was filed, and the complaint would properly have been dismissed if these were the only grounds. Wright v. Guiffre, supra; De Haven v. Gott, 18 L.D. 144 (1894).

which can be said to corroborate the allegations made by appellant in his contest complaint. In that affidavit, dated April 1, 1982, and notarized that same date, the affiant states that he personally inspected the subject lands and concluded that "said premises are unoccupied by Glenn W. Price." However, the affidavit does not support the conclusion that Price failed to establish a residence within the 6-month period required by 43 CFR 2567.5(a) because, as previously set forth, the entryman "had the whole of the latter day [April 1, 1982] for that purpose [i.e., to establish a residence]." Bennett v. Baxley, supra at 151.

In William Dittman, A-27312 (June 25, 1956), at page 2, the Deputy Solicitor held that a private contest against a homestead entryman will be dismissed where the application to contest is not corroborated by the affidavit of a witness stating that he has personal knowledge of facts set forth in his affidavit "which, if proved, warrant cancellation of the entry." 9/ The Deputy Solicitor stated that "the requirement of corroboration by one having personal knowledge of the facts, and the requirement that the facts must be stated in the corroborating affidavit, are jurisdictional." Id. The Deputy Solicitor relied on the case of Nemnich v. Colyar, 47 L.D. 5, 7 (1919), where it is stated that the requirement of corroboration "was adopted to prevent the allowance of unjustifiable attacks against entries, thus relieving the Land Department of the consideration of speculative and unwarranted contests and entrymen from the trouble and expense attendant on the defense

9/ The regulation in effect at the time of the filing of the application to contest in Dittman, 43 CFR 221.3 (1953), is similar to the current regulation, 43 CFR 4.450-4(c): "The statements in the application must be corroborated by the affidavit of at least one witness having such personal knowledge of the facts in relation to the contested entry as, if proven, would render it subject to cancellation, and these facts must be set forth in his affidavit."

thereof." The Dittman case rested on the fact that the affidavit of the corroborating witness had not set forth any facts. The rationale of that case, however, is applicable to the present case which turns on the fact that although the affidavit of Conrad Winegeart sets forth certain facts, those facts would not, if proved, warrant cancellation of the entry because they do not establish a failure to comply with 43 CFR 2567.5(a). BLM should have dismissed appellant's private contest complaint on that basis.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge